



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104906/2020
Held in Glasgow on 29 September 2021
Employment Judge S MacLean

Mr K Gilbert

**Claimant
Represented by:
Mr M Lynch,
Solicitor**

Fraser Haulage Ltd

**Respondent
Represented by:
Mr T Fraser,
Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) The claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £1,306.38. The dismissal was procedurally unfair but no compensatory award is made.

(2) The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the sum of £1,132.17.

(3) The claimant was dismissed in breach of contract in respect of notice and the respondent is ordered to pay the damages to the claimant in the sum of £261.27.

(4) The awards for holiday pay and notice pay have been calculated gross and any tax liability that might arise remains with the claimant.

REASONS

Introduction

1. On 18 September 2020 the claimant sent a claim form to the Tribunal complaining that he was unfairly dismissed; that he was entitled to a redundancy payment, holiday pay and other payments. The claimant said that his final payment was his "final furlough payment" and he had yet to receive his "final wage which includes my notice period and untaken annual leave". The claimant also sought a redundancy payment. The claimant said that the respondent had hired new employees since his dismissal despite stating that there was a downturn in work available.

2. The respondent resisted the claim. In the response the claimant's dates of

employment and rates of pay as detailed in the claim form were accepted as accurate.

3. Around 8 June 2021, the claimant provided a schedule of loss in which he sought a basic award equivalent to a statutory redundancy payment; a compensatory award and holiday pay.

4. At the start of the final hearing I endeavoured to clarify the issues to be determined. The claimant maintained that he was unfairly dismissed. From the claim form it appeared that the claimant considered that there might not be a genuine redundancy situation and that there had been no consultation process. The respondent's position was that there was a downturn in business and this was the reason why the claimant and another driver both of whom had been furloughed were dismissed. The respondent accepted that if the claimant's dismissal was for redundancy he had two years' qualifying service and was entitled to a redundancy payment. From the productions a redundancy payment had not been made in the final salary. There was also an agreement that the claimant was due on termination of employment, holidays that had accrued but had not been taken. Once again there was no dispute that outstanding holiday pay had not been made. There appeared to be some uncertainty as to the amount of holidays to which the claimant was entitled. There also appeared to be a dispute between the parties about whether the claimant was entitled to a payment for "lying time". This was not foreshadowed in the claim form or the schedule of loss.

5. I heard evidence from Mr Fraser, Director. The claimant gave evidence on his own account and his wife, Mrs Gilbert gave evidence on his behalf. During submissions which were brief Mr Lynch said that there was very little dispute between the parties particularly as having heard the evidence the claimant was no longer seeking a compensatory award only a basic award equivalent to the redundancy payment which had been accepted as being due. I made the following findings in fact.

Findings in Fact

6. The respondent is a limited company carrying on a haulage business from a depot in Coatbridge. Mr Fraser is a Director and shareholder of the business which he has operated for around 40 years. He is supported by a Transport Manager, Mr Laird and a Traffic Clerk, Mr McCarron. The respondent payroll service is outsourced to respondent's accountants. They arrange for the respondent's employees to be paid monthly directly into their bank accounts. An accountant visits the respondent's premises weekly to obtain the relevant information to undertake the payroll.

7. The respondent employs approximately 22 employees the majority of whom are drivers. The drivers are paid monthly.

8. The employees have not been issued with written terms and conditions of employment They are however entitled to receive statutory notice. The respondent's holiday year starts on 1 January. Employees are entitled to 30 days' annual leave inclusive of all statutory holidays.

9. The claimant commenced employment with the respondent on or around 20 January 2018. The claimant received a gross weekly wage of £435.46.

10. On or around May 2020 the respondent's workload was materially affected by restrictions that were in place due to the Covid 19 pandemic. At that time the respondent had 18 trucks. The claimant and another driver, who had less than 2 years' service, were placed on furlough. The trucks were parked permanently in the yard. One of the trucks was the truck generally used by the claimant which was the one that he preferred to drive and was the oldest vehicle in the fleet.

11. On or around 5 August 2020 the respondent wrote to the claimant advising him that due to the significant downturn in work due to the pandemic his employment was being terminated and unfortunately there was no suitable alternative work for the claimant. The claimant was given notice that his employment would terminate on 19 August 2020 and that he would not be required to work his notice period. The claimant was informed that any annual leave accrued but not taken would be added to his final pay. The claimant was informed that he had the right to appeal. A letter in similar terms was sent to the claimant's colleague who was also furloughed.

12. The claimant sent a letter to the respondent appealing the decision. The respondent did not receive the letter. An appeal hearing did not take place.

13. The respondent informed its accountant of the details of the claimant's

termination and was instructed to make all the appropriate payments to the claimant.

14. At the date of termination the claimant's final payment was the furlough payment and not his full salary. The claimant received 11 days' notice of termination. The claimant did not receive the redundancy payment. At the date of termination the claimant had taken six days' leave but was not paid for the remaining 13 days that had accrued at the date of termination.

Conflict of evidence and observations on witnesses

15. I considered that all the witnesses gave their evidence honestly and to the best recollection of their events. There appeared to be a breakdown in communication between the parties. It was regrettable that the parties had not had a more open channel of communication as this matter could have been resolved quickly and amicably.

16. Mr Fraser was candid and straightforward in his evidence. He readily made concessions when they were not in his favour. Mr Fraser appeared to have relied heavily on the accountants from whom he wrongly assumed had paid all money to which the claimant was entitled. I did not form the impression that Mr Fraser was seeking to avoid making payments to the claimant and I did not underestimate that during the period about which I was concerned Mr Fraser was under considerable pressure both financial and personal.

17. The claimant and Mrs Gilbert also in my view gave their evidence honestly. I have no reason to doubt that they had appealed the decision to terminate employment. I was also satisfied that for whatever reason the letter of appeal was not received by Mr Fraser.

18. There was a dispute about the number of holidays provided by the respondent. The claimant's evidence was that it was 28 days inclusive of statutory holidays whereas Mr Fraser's evidence was that it was 30 days inclusive

of statutory holidays. While the claimant's evidence was consistent with the statutory entitlement given that Mr Fraser was quite adamant on this point I preferred his evidence as he could have easily accepted the claimant's position which would have resulted in a lower payment.

19. In relation to the lying time, the claimant's evidence was that there was a month's lying time due to him. This was strenuously disputed by Mr Fraser who said that employees were paid monthly in arrears and that he did not operate lying time. On the contrary he would normally make advance payments particularly when employees started their employment with the respondent.

20. During submissions Mr Lynch suggested that perhaps due to the timing of the claimant starting employment he was not paid his January salary which might be why he considered that there was lying time. I had some difficulty with regard to the start date. The situation was not assisted by the fact that the response (ET3) agreed with the dates of employment. Mrs Gilbert gave evidence to the effect that the claimant started employment around her birthday (18 January). During submissions (but not in evidence) Mr Fraser referred to the claimant not starting until early February as he had since clarified this with the accountants. I considered it unusual in respect of employees paid monthly for there to have been a month's lying time. It also seems surprising that the claimant would commence working on a Saturday and if he was not paid at the end of January then he would be expected that his February 2018 salary would include wages from his start date. If there was a shortfall at that point that would be the date on which it was due not when the claimant's employment terminated. I also noted that this payment was not foreshadowed in the claim form or the schedule of loss. For these reasons I preferred the respondent's evidence. Accordingly I did not consider that there had been any unnecessary deduction of wages in respect of lying time.

Deliberations

21 . In relation to the unfair dismissal claim it was not entirely clear to me whether this was withdrawn or whether only a basic award was being sought. I was however satisfied that during the period from May 2020 there was a reduction in the amount of work to be undertaken by the respondent in that rather than using 18 trucks only 16 were being used. The respondent was able to place the claimant and another employee on furlough but at that stage this scheme was not going to continue indefinitely. The respondent also had the cost of having two vehicles being parked in the yard for which there were costs for insurance and depreciating assets. These vehicles were subsequently sold and that the number of vehicles has not increased back to 18. The respondent has not increased the number of drivers. I was therefore satisfied that a redundancy situation existed. In relation to the selection procedure it appears there was no consultation and in this respect the dismissal was unfair.

22. The claimant was entitled to a basic award which in any event is equivalent to a redundancy payment. I calculated this based on the weekly wage of £435.46. As the claimant was aged 66 years at the date of termination he is entitled to a redundancy pay of £1,306.38 (2 weeks x 1% times £435.46). The claimant was not seeking nor did I consider it appropriate to award any compensatory award from the date of dismissal to the date of hearing. No evidence was provided in relation to mitigation of loss or benefits received by the claimant.

23. In relation to holiday pay I accepted that the claimant was entitled to 30 days holiday pay per year. The period 1 January to 5 August 2020 is 232 days. Accordingly the claimant is entitled to 19 days holiday to the date of dismissal(30 x £232 + 366). He used six days in 2020 and therefore had 13 days due on termination of employment. One day's holiday pay is £87.09 (£435.46 + 5). The sum due in respect of holiday pay is £87.09 x 13 days that is £1,132.17.

24. The claimant was given notice of termination of employment. It was accepted that he did not receive this notice until the letter was received which was not until 8 August 2020. Accordingly the claimant is entitled to 3 days' wages which is £261 .27 for damages.

Employment Judge: Shona MacLean
Date of Judgment: 20 October 2021
Entered in register: 29 October 2021
and copied to parties